
U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street
Suite 900
Cincinnati, Ohio 45202

Date Issued: April 23, 1991
Case No. 91-CAA-2

In the Matter of

RAYMOND B. NOTTINGHAM, JR.,
Complainant,

v.

FEDERAL PRISON INDUSTRIES

(UNICOR),

Respondent.

Appearances:

Raymond B. Nottingham; Jr.,

Pro Se

Stephen E. Heretick, Esq.

For the Respondent

Before: Daniel J. Roketenetz

Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Clean Air Act Amendments of 1977 (42 U.S.C. Section 7622, *et seq*.) hereinafter called CAA and the Toxic Substances Control Act (15 U.S.C. Section 2622, *et seq*.) hereinafter called TSCA. These statutes prohibit an employer from discharging or otherwise discriminating against an employee who has engaged in activity protected under the CAA or the

---

[Page 2]

TSCA. These statutes are implemented by regulations designed to protect so-called "whistleblower" employees from retaliatory or discriminatory action by their employers. (29 C.F.R. Part 24) An employee who believes that he or she has been discriminated against in violation of "these acts may file a complaint within 30 days after the occurrence of the alleged violation.

Issue Presented:

The sole issue considered is whether the Complainant is an "employee" within the meaning of the TSCA or CAA.

Based on the pleadings and motions submitted by the parties, I hereby make the following:

RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background:

On October 4, 1990, the District Director of the Employment Standards Administration, Wage and Hour Division, U.S. Department of Labor, notified the Respondent that it had been determined that the Complainant's alleged protected activities involving the Clean Air Act and the Toxic Substances Control Act were a motivating factor with respect to the adverse action taken against him.

On October 12, 1990, the Respondent filed a telegraphic request for plenary reconsideration of the District Director's determination and for a stay of proceedings. However, the Respondent did not specifically request a hearing as required by the regulations. (29 C.F.R. Part 24.4(d)(3)(i)). Nevertheless, since the telegraphic request was timely and otherwise in accord with the regulations, it was treated as a request for hearing and assigned to the undersigned.

On October 19, 1990, I issued an Order advising counsel for the Respondent that the regulations did not provide for plenary reconsideration of the District Director's determination. However, the proceedings were stayed to permit the parties to file any preliminary motions deemed appropriate by them.

[Page 3]

On November 9, 1990, the Respondent, by counsel, filed a Motion for Stay of All Proceedings. The Respondent sought a stay until such time when a final determination was rendered by the Office of the Solicitor of the Department of Labor with respect to the threshold issue of whether inmates committed to the custody of the Attorney General of the United States are "employees" who may be afforded the protection of the employment discrimination prohibitions of the statutes under which this case arises. The Respondent attached to his Motion a memorandum prepared by the United States Department of Justice, Office of Legal Counsel. In the memorandum, the United States Department of Justice, Office of Legal Counsel concludes that federal inmates are not subject to "whistleblower" protection afforded to "employees" under these Acts.

I noted in my Order denying the Motion for Stay that the internal memorandum relied upon by the Respondent did not appear to constitute an opinion of the Attorney General. Moreover, there was nothing before me that indicated that the Attorney General had adopted the memorandum. It also appeared that the so-called dispute between the agencies, *i.e.*, the U.S. Department of Labor and Federal Prison Industries (hereinafter FPI) had not been submitted to the Attorney General for resolution pursuant to Executive Order 12146. Accordingly, I rejected the Respondent's contention that the internal memorandum of the Justice Department is controlling.

On November 13, 1990, the Complainant filed a Preliminary Statement and Request for Declaratory Judgment. Thereafter, on November 16, 1990, the Complainant filed an Opposition to Motion for Stay and Request for Formal Hearing Pursuant to Regulations, Section 24.5(a)(c)(d) and (e). I carefully reviewed the Motions filed by the Complainant, but I declined to rule on them at that juncture since my review of the pleadings disclosed that there were certain fundamental jurisdictional issues that needed to be first addressed.

Consequently, on December 4, 1990, I issued an Order to Show Cause. The order directed the Complainant to show cause why this complaint should not be dismissed due to untimeliness of filing, failure to state a cause of action and because he is not an "employee" within the meaning of the Clean Air Act and the Toxic Substance Control Act. The Complainant filed a response thereto on January 3, 1991.

[Page 4]

Contentions of the Complainant:

The Complainant alleges that while he was incarcerated at the federal penitentiary in Lewisburg, Pennsylvania, he was employed by FPI as a welder. Due to his performance as a welder, the Complainant rose through the pay scales from a grade four, which is the lowest, to a grade one, the highest level an inmate can attain. He contends that he was then transferred from Lewisburg, Pennsylvania to Petersburg, Virginia. Upon his arrival he was demoted from grade one to grade four and was denied increases in pay. Lastly, the

Complainant argues that the reason he was discriminated against was because he assisted another federal inmate, William Teves, in the preparation of Mr. Teves' action against FPI.[1]

The Complainant's Status as an "Employee":

In support of his argument that he is an employee entitled to the whistleblower protection provisions of the statutes here involved, the complaint cites *Plumley v. Federal Bureau of Prisons*, 86-CAA-6. In *Plumley*, an Administrative Law Judge therein apparently held, in disposing of a Motion for Summary Judgment and/or Motion to Dismiss, that federal prison inmate workers were employees entitled to the employment protection provisions of the Clean Air Act and the Toxic Substances Control Act. The Judge's opinion is not published. Moreover, the published opinions of the Secretary of Labor do not address this issue and it has not been resolved by the Secretary. Reported opinions of the Secretary in the *Plumley* case include an Order Denying Interlocutory Appeal,[2] OAA 2 at p. 411 (1987),2 an Order Denying Complainants' Motion for Default Judgment, 1 OAA 3, p. 381 (1987) and an Order of Dismissal 1 OAA 4, p. 260 (1987). The latter Order reflects that the *Plumley* case was settled before a trial on the merits. The decision of the Administrative Law Judge in *Plumley* never resulted in a final order of the Secretary of Labor affirming the Judge's finding that federal prison inmates are employees within the meaning of the applicable statutes. Therefore, I find that the earlier finding of the Administrative Law Judge has no precedential value in the instant case.

Both the TSCA and the CAA contain identical clauses prohibiting an "employer" from "discharging ... or otherwise discriminating"

(with respect to "compensation, terms, conditions, or privileges of employment") against an "employee" who "commences", "testifies", "assists" or "participates" in a TSCA and CAA proceeding directed against the employer. 15 U.S.C. § 2622(A); 42 U.S.C. § 7622(A). In order to remedy discriminatory acts, these statutes authorize "[a]ny employee" to "file ... a complaint with the Secretary of Labor ... alleging such ... discrimination." 25 U.S.C. § 2622(b)(1); 42 U.S.C. 7622(b)(1). If the Secretary finds a violation, he is empowered to order the employer "to reinstate the complainant to the complainant's former position together with the compensation, terms, condition, and privileges of the complainant's employment" plus compensatory damages. 15 U.S.C. § 2622(b)(2)(B); 42 U.S. C. § 7622(b)(2)(B). Neither of these statutes define the terms "employer" or "employee". However, both statutes seek to protect a "whistleblowing" employee from being discriminated against by an employer.

"The employment relationship has historically been a blend of status and contract, a relationship governed by a mixture of legally imposed rules expressing customs or public policies, and voluntarily bargained rules expressing mutual assent." *Legal Protection for The Individual Employee*, Finkin, Goldman and Summers, West Publishing Company,

1989, at p.1. To "employ" someone means to engage their services and "implies a request and a contract for a compensation." An "employee" is "one who works for an employer; a person working for salary or wages." *See Black's Law Dictionary*, Fourth Edition, 1957. It would appear, therefore, that the traditional notion of an employer-employee relationship is one which is contractual in nature and one which exists at the will of the contracting parties.

Although the term "employee" is not defined in the CAA or TSCA there is nothing therein to suggest that either statute contemplates anything other than an employment relationship in the traditional sense. Moreover, while I would fully agree that the term "employee" should be broadly construed so as to provide protection to as large a population of whistleblowers as possible, neither statute compels that the normally recognized concept of an employer-employee relationship be convoluted to extend coverage.

A federal prisoner is "committed, for such term of imprisonment as the sentencing court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served." 18

U.S.C. 4082(A). Therefore, being committed to a federal penal institution, federal prisoners are incapable of entering into a contractually-based employer-employee relationship because the work they perform involves involuntary servitude. *See Emory v. United States*, 2 Ct. Cl. 579, 580 (1983).

The way in which federal prisoners are assigned work also demonstrates that they are not "employees". The work performed by federal prisoners is controlled by FPI. The FPI determines in what way and extent operations shall be carried on by federal prisoners. Based on 18 U.S.C. § 4122(a), a federal prisoner is assigned work by the FPI and the prisoner does not voluntarily enter into a contract for hire. Moreover, payments made to federal prisoners are not a matter of contractual right. Instead, they are rendered "solely by congressional grace and governed by the rules and regulations promulgated by the Attorney General." *Sprouse v. Federal Prison Industries, Inc.*, 480 F.2d 1 (5th Cir.), *cert. denied*, 414 U.S. 1095 (1973).

The corollary to the term "employee" is the term "employer". It is clear that during his period of incarceration the penal system, of which FPI is a part, is the custodian of the Complainant. To be sure, the prison system is an "employer" in the typical sense of many employees, *eg.*, guards and support personnel, but clearly, as to prisoners, the relationship is custodial.

Although there are no cases dealing with this issue under the CAA or the TSCA, analogy to other federal statutes are instructive on this point. There is substantial case law on whether a federal prisoner is an employee within the meaning of the Fair Labor

Standards Act.[3] In *Amos v. United States*, 13 Cl. Ct. 442 1987), a civilian cook foreman at a prison brought an action under the Fair Labor Standards Act to secure the payment of overtime. The *Amos* court held that the cook foremen was an employee within the Fair Labor Standards Act. However, the court held that inmate workers supervised by the cook foreman were not employees. The court stated that:

> [c]learly, the inmates provide a service to the government and are paid a minimal amount. Yet inmates are technically and realistically not employees. 'Economic reality is the test of employment as bearing on the applicability of the FLSA.' *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973). The economic reality is that

---

[Page 7]

> inmates are convicted criminals incarcerated in a penitentiary. *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 787 (E.D. Mich. 1971), *aff'd*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 . . . . (1972). They are not civil servants. Inmates are not free to set their wages through negotiation or bargaining; they may not form unions or strike; and they may not quit work. Their service in vocational programs and their right to compensation is solely by legislative grace, primarily for their own benefit and rehabilitation. *Sprouse v. Federal Prison Industries, Inc.*, 480 F.2d 1 (5th Cir. 1973), *cert. denied*, 414 U.S. 1095 . . .

Amos 13 Cl. Ct. at 445-46. *See also Huntley v. Gunn Furniture Co.*, 79 F. Supp. 110 (W.D. Mich, 1948); *Hudgins v. Hart*, 323 F. Supp. 898 (E.D. LA. 1971): *Sims v. Parke Davis & Co.*, 334 F. Supp. 774 (E.D. Mich.) *aff'd*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); *Worsley v. Lash*, 421 F. Supp. 556 (N.D. Ind. 1976).

In *Carter v. Dutchess Community College*, 735 F. 2d 8 (2nd Cir. 1984), another case arising under the Fair Labor Standards Act, an inmate participated in a work release program offered by Dutchess Community College. The inmate alleged that while he worked as a teaching assistant he was compensated at a level below the federal minimum wage, in violation of the Fair Labor Standards Act. The court held that in order to determine whether the prisoner was an employee of the community college, the court must evaluate the "economic reality" of the relationship. The court held that an "inmate may be entitled to receive the federal minimum wage from an outside employer depending on how many typical employer perogatives are exercised over the inmate by the *outside* employer and to what extent." *Carter* 735 F.2d at 14. (Emphasis added)

A case more directly on point is *Young v. Cutter Biological*, 694 F. Supp. 651 (D. Ariz. 1988). In *Young*, the plaintiffs were inmates at an Arizona State prison. During their incarceration? the inmates worked at a "Plasma Center" located at the institution and operated by defendant Cutter Biological. The inmates sought to recover minimum wages for their labor under the Fair Labor Standards Act. The inmates brought action against Cutter Biological

---

[Page 8]

and the State Department of Corrections. The *Young* court held that the inmates could not recover minimum wages from Cutter Biological or the State Department of Correction.

The court addressed the inmates action against the state separately. The court phrased the issue as whether the state or its agencies could ever be "employers' within the meaning of the Fair Labor Standards Act. The court stated that the "economic realities" test is appropriate in the typical inmate labor case, such as *Carter, Alexanders, Hudgins* and *Sims*, where the inmate claims the outside company is his employer. However, in *Young* the inmates sought to apply the "economic realities" test to the Custodial relationship between the correctional institute and the inmate. The court rejected the inmates argument and stated that the "economic realities" test is inapplicable in this type of action.

Moreover, the court stated that cases such as *Carter, Alexander, Hodgins* and *Sims* support the holding that the state or its agencies cannot be "employers" within the FLSA. The court stated that in the typical inmate labor case where the inmate claims the outside company is his employer, the courts examine whether the outside company exercise typical employer perogatives over the inmates. *Young*, 694 F. Supp. at 657. If the court concludes that the private company does not retain the traditional employer rights, then it follows that the FLSA is not applicable because the inmates labor belongs to the institution and inmate laborers do not lose their primary status as inmates simply because they work. Therefore, the court concluded that neither the state nor its agencies could ever be considered employers of the inmates.

More recently, in *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991), the court considered the suit of a prison inmate alleging, inter alia, discrimination and retaliation in connection with prison job assignments. In holding that the prison inmate was not an employee under Title VII of the Civil Rights Act or the Age Discrimination in Employment Act (ADEA), the Court found that his relationship with the Bureau of Prisons arose out of his status as an inmate and not as an employee. The court said:

[Page 9]

> Although his relationship with defendants may contain some elements commonly present in an employment relationship, it arises "from [plaintiff's] having been convicted and sentenced to imprisonment in the [defendant's] correctional institution. The primary purpose of their association (is) incarceration, not employment."

Williams, 926 F.2d at 997, citations omitted.

Based on the foregoing, I find that the Complainant is not an employee within the meaning of either the Clean Air Act of the Toxic Substances Control Act. His status arises out of incarceration at FPI and his relationship with FPI is not contractual in nature. Therefore, he is not entitled to the anti-discrimination provisions contained therein. Since the Complainant is not an employee entitled to the protection of the statutes under which

he brings this matter, this agency is without jurisdiction to consider the allegations of his complaint. *See Wensil v. B. F. Shaw Company, Savannah River Plant, et al*, Final Decision and Order of the Secretary 86-ERA-15, etc. 4 OAA 2 at p. 85 (March 29, 1990). In view of my findings herein, it is unnecessary to consider any other issues raised as a consequence of the filing of the Complaint in this case. Accordingly, I enter the following:

RECOMMENDED ORDER

It is Ordered that the Complaint of Raymond B. Nottingham be, and it hereby is, DISMISSED.

DANIEL J. ROKETENETZ
Administrative Law Judge

[ENDNOTES]

[1] William Teves has filed a complaint alleging violations of the Clean Air Act and the Toxic Substances Control Act.

[2] Decisions of the Secretary of Labor are published in volumes entitled, *Decisions of the Office of Administrative Law Judges and Office of Administrative Appeals* (OAA). Reference to such decisions indicate the volume, number and page of the decisions of the OAA.

[3] In fact, the Department of Labor, Wage and Hour Division, Field Operations Handbook provides:

> Generally, a prison inmate who, while serving a sentence, is required to work by or who does work for the prison, within the confines of the institution, on prison farms, road gangs, or other areas directly associated with the incarceration program is not an employee within the meaning of [Title VII of the Civil Rights Act of 1964] (Section 10 b 29 (a), June 24, 1975).

See EEOC Decisions No. 86-7, 40 FEP Cases 1892 (April 16, 1986).